Supreme Court, U.S.
FILED

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No.

In The
Supreme Court of the United States
October Term, 1996

LORI G. McKENZIE,

Petitioner,

v.

RENBERG'S, INC., and ROBERT L. RENBERG,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether a personnel director, who has formed a good faith belief that her employer is violating the overtime pay requirements of the Fair Labor Standards Act, engages in "protected activity" under §15(a)(3) of the Act when she reports her belief to the company's attorney and then to its President and principal owner, persists in that belief and then is fired in retaliation for expressing her belief.

LIST OF PARTIES

Lori G. McKenzie, Petitioner

Renberg's, Inc., and Robert L. Renberg, Respondents

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Lori G. McKenzie, respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

McKenzie v. Renberg's, Inc., 94 F.3d 1478 (10th Cir.1996).

The opinion of the Court of Appeals is reported at 94 F.3d 1478(10th Cir. 1996) and is reproduced in the Appendix filed herewith. The unreported opinions of the district court in the case are also reproduced in the Appendix filed herewith.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed in this Court was entered by the Court of Appeals for the Tenth Circuit on September 4, 1996. After the timely filing of a Petition for Rehearing, the Court of Appeals entered its Order denying the Petition for Rehearing on October 22, 1996.

This Court has jurisdiction to review the judgment of the Court of Appeals on writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

§ 215. Prohibited acts; Prima facie evidence

(a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person--

> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3)

STATEMENT OF THE CASE

Material Facts

Lori G. McKenzie (the Petitioner) was employed as the Personnel Director of Renberg's, Inc. (a Respondent), from May, 1985 to September 20, 1991. In her capacity as Personnel Director, Petitioner was responsible for monitoring compliance with State and Federal equal employment opportunity laws, wage and hour laws, and other laws regulating the workplace. She was also responsible for the hiring, training, and firing of employees. See Answer Brief of Appellee, pp. 6, paragraphs 2 and 7, and 4.

In August, 1991, a co-worker of Petitioner, Marsha McElroy (the Controller of Renberg's), attended a seminar on wage and hour laws and received various informational materials. At McElroy's request, Petitioner reviewed these materials, discussed them with McElroy, and became concerned that the company was not properly paying overtime to certain of its sales associates and certain department

managers, in violation of the Fair Labor Standards Act. See Answer Brief of Appellant, p. 5, paragraphs 1 and 2.

Petitioner based her concerns upon her knowledge of the workers and upon her six years of experience in serving as Personnel Director. To investigate the wage and hour issue further, Petitioner reviewed time cards of employees and reviewed a computer printout of employees showing rates of pay, which she asked a payroll manager to produce. See App. App. 66-76.

After reviewing these materials and discussing the issues with McElroy, Petitioner sought a meeting with the company attorney who she had been directed to consult on personnel issues. With the results of her investigation, the computer printout, and a company manual, Petitioner and McElroy met with the company attorney on September 4, 1991 to discuss their concerns. Petitioner explained her concerns to the attorney, showed him the materials and the computer printout and expressed her belief that the method of compensating certain sales associates and certain department managers violated the Fair Labor Standards Act. After her meeting with the attorney, Petitioner, on two occasions, told the company president and principal owner of the company, Robert L. Renberg (a Respondent), that she had discussed her concerns about the perceived wage and hour violations with the company attorney. She had the impression that Mr. Renberg had discussed the matter with the attorney. Subsequently, Petitioner continued to discuss her concerns with McElroy and began to fear for her job. See App. App. pp. 78-85, 88-90.

After the meeting with the company attorney, Petitioner became the subject of an internal security investigation. On September 20, 1991, Petitioner was terminated by Respondents. After her termination, Petitioner contacted the Department of Labor and later filed a complaint. See App. 56-7.

Procedural Background

Petitioner brought this action in the District Court against Respondents, asserting that she was terminated in violation of the anti-retaliation provisions of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3). The District Court had jurisdiction pursuant to the provisions of 29 U.S.C. §216(b) and 28 U.S.C. §1331. See Appellant's Brief in Chief, pp. 2-4.

The trial was conducted in three stages, with the question of liability decided first, followed by the jury's determination of back pay and compensatory damages, and finally, of punitive damages. The evidence presented at trial was disputed. The Petitioner presented evidence tending to show that her termination was on account of her reporting her concerns of wage and hour violations to the company attorney and to the company president. The Respondents presented evidence tending to show that Petitioner was terminated for two separate non-retaliatory reasons. At the close of the liability phase of the trial, the District Court instructed the jury that "good faith reporting or communicating concerns regarding possible FLSA violations is protected activity". Respondents objected to this instruction. See Appendix B, p. 25a-26a, 33a, Opinion of the Tenth Circuit.

After deliberating on the liability phase, the jury concluded that the Respondents' asserted non-retaliatory reasons for discharging Petitioner were pretextual and returned a special interrogatory finding that Petitioner was terminated in retaliation for reporting her belief that Renberg's, Inc. was in violation of the Fair Labor Standards Act. See Appendix B, p. 26a, Opinion of the Tenth Circuit.

After the two damages phases of the trial, the jury returned verdicts awarding Petitioner $100,000 in back pay, $175,000 in emotional distress damages, and $50,000 in punitive damages. On July 15, 1994, the District Court issued its findings of fact and conclusions of law, granted judgment in favor of Petitioner for back pay and liquidated damages, and made other rulings not relevant here. See App. 25-31.

Respondents then filed a Motion for Judgment as a Matter of Law under Fed. R. Civ. P. 50, or in the alternative, a Motion for New Trial under Fed. R. Civ. P. 59. The District Court granted the Motion for Judgment as a Matter of Law, and ruled that the Motion for New Trial was moot. See Appendix B, p. 26a Opinion of the Tenth Circuit.

Petitioner timely perfected her appeal of the District Court's ruling on Respondents' Motion for Judgment as a Matter of Law. The Court of Appeals for the Tenth Circuit ruled that sufficient evidence existed to submit to the jury the question of the "but for" cause of the Petitioner's termination. However, the Court of Appeals affirmed, holding that Petitioner did not engage in protected activity under §15(a)(3) of the Act when, in her capacity as Personnel Director, she

undertook to advise Renberg's, Inc. that its wage and hour policies were in violation of the FLSA. See Appendix B, p. 35a Opinion of the Tenth Circuit.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Introduction

The issue in this case is whether the legal duty imposed on a personnel director by the Fair Labor Standards Act should be preferred over the personnel director's status as a member of management. The Court of Appeals would require a personnel director to "cross the line" from being a management employee to taking a position adverse to the company. In other words, a personnel director, the Court of Appeals would say, is the company itself. So, unless she steps out of her role as personnel director and takes a role as adversary or opponent, she is not speaking or acting separate from the company. The company is essentially speaking to itself.

In this, the Court of Appeals erred. Its concept is fundamentally flawed, as it violates the intent of Congress and the remedial purpose of the Fair Labor Standards Act.

A.

THE ANTI-RETALIATION PROVISIONS OF §15(a) (3) HAVE BEEN GIVEN BROAD AND LIBERAL CONSTRUCTION IN ORDER TO IMPLEMENT THE REMEDIAL PURPOSES OF THE FAIR LABOR STANDARDS ACT.

This Court has directed that a broad and liberal construction of the Fair Labor Standards Act should be applied so as to implement the intent of Congress. In Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960), this Court reviewed the means Congress intended to be used to effectuate enforcement of the Fair Labor Standards Act. Primary among them was that Congress determined that enforcement of the Act would best be enhanced by information brought forward by employees. There, Mr. Justice Harlan wrote:

> [Congress] chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied . . . for it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions. [citation omitted] By the proscription of retaliatory acts set forth in §15(a)(3), . . . Congress sought to foster a climate in which compliance with the

> substantive provisions of the Act would be enhanced.

361 U.S. 288, 292.[1]

The Courts of Appeals and the District Courts have with almost total uniformity employed this broad and liberal construction of the Act when applying the provisions of §15(a)(3). Accordingly, courts have held that an employee who gives a statement to the Wage and Hour Division of the Department of Labor is protected even though that employee has not "filed any complaint", but has merely communicated with investigators, Daniel v. Winn-Dixie Atlanta, Inc., 611 F.Supp. 57 (N.D.Ga. 1985). Likewise, §15(a)(3) has been held to protect an employee who insisted on receiving or refused to return to the employer an award of unpaid wages obtained for him by the Department of Labor, Brock v. Casey Truck Sales, 839 F.2d 872 (2nd Cir. 1988); Brennan v. Maxey's Yamaha, Inc., 513 F.2d 179 (8th Cir. 1975).

Using the same broad and liberal construction, §15(a)(3) has been held to prohibit retaliation against an employee whose employer mistakenly believed he had filed a

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[1] In Tennessee Coal, Iron & R.Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944), the Court had earlier noted that the provisions of the Act relating to overtime pay were "remedial and humanitarian in purpose". The Court went on to say: We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specifically legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.
321 U.S. 590, 597.

claim under the Act, Saffels v. Rice, 40 F.3d 1546 (8th Cir. 1994); Brock v. Richardson, 812 F.2d. 121 (3rd Cir. 1987). The Section has also been applied to protect an employee who engaged in activity on behalf of a co-worker, York v. City of Wichita Falls, 944 F.2d 236 (5th Cir. 1991), Drollinger v. State of Arizona, 962 F.2d 956 (9th Cir. 1992), and an employee who asserted the rights of a spouse, Marshall v. Georgia Southwestern College, 489 F.Supp. 1322 (M.D.Ga. 1980).

Extending this Court's broad and liberal interpretation, §15(a)(3) has also been applied to complaints communicated to the employer itself. In Love v. RE/MAX of America, Inc., 738 F.2d 383 (10th Cir. 1984), the Court of Appeals for the Tenth Circuit held that a vice-president's request for a pay raise to her superior, with a copy of the Equal Pay Act attached, was protected under §15(a)(3), citing this Court's decision in Mitchell v. DeMario, supra. See also, EEOC v. White and Son, 881 F.2d. 1006 (11th Cir. 1989); and EEOC v. Romeo Community Schools, 976 F.2d 985 (6th Cir. 1992).

The Decision of the Court of Appeals in this case paid lip service to its earlier decision in Love and to that of the Sixth Circuit in Romeo Community Schools (App. B, p. 35a). Yet, the Court refused to extend its earlier holding to the conduct of the Petitioner in this case.

While the Court did not cite any authority for its holding, the key to its decision seems to be its statement that the Petitioner never "crossed the line" from being an employee merely performing her job as Personnel Director to an employee "asserting a right adverse to the company" (App. B, p. 37a). Rather, the Court noted, the Petitioner, in her

capacity as personnel manager, merely informed the company that it was at risk of claims that might be instituted by others as a result of its alleged FLSA violations (App. B, p. 35a). In order to engage in protected activity under §15(a)(3), the Court of Appeals would require the Petitioner to "step outside his or her role of representing the company" (App. B, p. 36a).

Therein lies the error of the Court of Appeals' decision in this case. The Court failed to apply the broad and liberal interpretation of the Act that has been adopted by this Court. In order to give effect to the "remedial and humanitarian" purposes of the Act, the Court should have held that the District Court's instruction was correct as a matter of law; that is, that "the good faith reporting or communicating concerns regarding possible FLSA violations is protected activity".

B.

THE COURT OF APPEALS FAILED TO RECOGNIZE THAT THE FAIR LABOR STANDARDS ACT IMPOSES INDEPENDENT LEGAL DUTIES UPON A PERSONNEL DIRECTOR.

The Petitioner in this case was the Personnel Director of a corporation operating retail department stores. In that position, her job responsibilities required her to hire, train, discipline and fire employees and to maintain the corporation's compliance with the Fair Labor Standards Act and other laws governing employees and the workplace. The Petitioner is therefore not an officious meddler or a stranger

to the corporation's compliance with the Fair Labor Standards Act. Congress has specifically mandated for her a function separate and apart from her function as a management employee. She is independently liable, both civilly and criminally, for the company's compliance with the Act.

Status as a "person" under the Act

Congress specifically intended that an employee having the duties of the Petitioner occupy a unique position, with its own legally cognizable duties. By its terms, §15(a) makes it unlawful for any "person" to violate the provisions of §6 of the Act (relating to minimum wage), or §7 of the Act (relating to overtime pay), or §15(a)(3) of the Act (relating to retaliation under the Act). Under the provisions of §16(a) of the Act [29 U.S.C. §216(a)], any "person"[2] who willfully violates any of the provisions of §15 is subject to criminal prosecution, and upon conviction is subject to fines or imprisonment, or both.

Thus, a personnel director who willfully maintains compensation plans which do not comply with the Act, or a payroll supervisor who knowingly pays employees less than they are entitled to under the Act may be convicted under the Act. See, Meek v. United States, 136 F.2d. 679 (6th Cir. 1943). This threat to the liberty interest of a "person" under the Act is direct and independent of any other legal relationship. This threat of criminal liability sets a personnel

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[2] Under the Act, "person" is defined as "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons," §3(a) [29 U.S.C.§203(a)].

director apart from other management employees, and apart from the corporation itself.

Status as an "employer" under the Act

Moreover, a personnel director can be held to be an "employer" under the Act and therefore may be subject to civil liability, as well. Section 16(b) of the Act provides that any "employer"[3] who fails to pay the minimum wage or overtime pay to an employee or who discharges or discriminates against an employee in violation of §15(a)(3) of the Act shall be liable for the damages allowed under the Act.

The district courts and courts of appeals have not hesitated to apply the definition of "employer" to cover management employees. See Dole v. Haulaway, Inc., 723 F.Supp. 274 (D.N.J. 1989). (corporate officers exercising control, including a payroll supervisor, are "employers"): McLaughlin v. Lunde Truck Sales, Inc., 714 F.Supp. 920 (N.D. Ill. 1989) (president of corporation was an "employer"); Shultz v. Falk, 439 F.2d. 340 (4th Cir. 1971) (rental agents who hire, fire and supervise building workers are "employers"); Estevez v. Hayes, 1990 W.L. 605076 (D.Or. 1990) (contractor who hired and fired agricultural workers was an "employer"); Donovan v. Sabine Irrigation Co., Inc., 695 F.2d. 190 (5th Cir. 1983) (president of corporation is an "employer"); and Donovan v. Agnew, 712 F.2d. 1509 (1st Cir. 1983) (corporate officers with significant ownership interest and operational control of corporation's

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[3] Under Section 3(d) of the Act, an "employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee, [29 U.S.C.§203(d)].

day to day functions including compensation of employees are "employers").

As is the case with criminal liability imposed upon a "person", civil liability attaches to an "employer" whether or not the actual corporate employer is also sued. Civil liability, as created by the Act, is separate and apart from the employee's relationship to the actual employer. It is an independent legal duty mandated by Congress and imposed by the Act. It cannot be waived or defended or explained away by a claim that the employee was merely "doing her job".

The record in this case demonstrates that as the normal incidents of her duties as personnel director, Petitioner had responsibility for hiring and firing of employees, of supervising and training them and maintaining their method of compensation in compliance with provisions of applicable law[4]. Petitioner, therefore, at the times of her meetings with the company attorney and with the company president, was both a "person" subject to criminal liability and an "employer" subject to civil liability under the Act. Her expressions of her belief that the company was violating the Act were by law her own separate acts, not the company's, because they were founded on a separate duty imposed on her alone. To require her to take additional actions to set her apart from her corporate employer in order to be protected under the Act is erroneous as a matter of law.

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[4] These facts were admitted by the Respondents in the court below (Appellee's Answer Brief, page 7) and are binding upon them in this Court.

C.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE POSITION OF THE SECRETARY OF LABOR UNDER OTHER FEDERAL STATUTES GUARANTEEING THE PROTECTION OF EMPLOYEES.

The Decision of the Court of Appeals conflicts with the position taken by the Secretary of Labor and by the Courts of Appeals in decisions under other federal statutes protecting employees from retaliation.

Congress has conferred upon the Secretary of Labor the responsibility to enforce seven federal statutes guaranteeing employees' freedom from employer retaliation[5]. Those statutes are (or, have been, at relevant times) in their material provisions identical to §15(a)(3) of the Fair Labor Standards Act. According to its statutory duty, the Department of Labor provides an administrative remedy for employees who have been discharged or discriminated against because they engaged in protected activity. To accomplish that duty, the Department has promulgated Regulations which define the activity which is protected under each of these statutes.

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[5] Safe Drinking Water Act, 42 U.S.C. §300j-9(I); Federal Water Pollution Control Act, 33 U.S.C. §1367; Toxic Substances Control Act, 15 U.S.C. §2622; Solid Waste Disposal Act, 42 U.S.C. §6971; Clean Air Act, 42 U.S.C. §7622; Energy Reorganization Act of 1974, 42 U.S.C. §5851; and Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9610.

In its Regulations, 29 C.F.R. §24.2(b)(3), the Department considers that any employee who has (among other things):

> Assisted or participated, or is about to assist or participate . . . in any other action to carry out the purposes of such Federal statute.

has engaged in "protected activity".

This Regulation has been upheld as a valid exercise of the Secretary's authority under various statutes[6], notwithstanding that the reporting of illegalities was a part of the employee's job, and the employee did not "cross the line". See, for example, Passaic Valley Sewerage Commissioners v. United States Department of Labor, 992 F.2d 474 (3rd Cir. 1993), cert. denied 510 U.S. 964 (1993). There, in reliance upon this Court's decision in Chevron,

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[6] Energy Reorganization Act (prior to changes effected in 1992): Kansas Gas & Electric Company v. Brock, 780 F.2d 1505 (10th Cir. 1985), cert. denied 478 U.S. 1011 (1986); Mackowiak v. University Nuclear Systems, Inc., 735 F.2nd 1159 (9th Cir. 1984); Norris v. Lumbermen's Mutual Casualty Company, 881 F.2d 1144 (9th Cir. 1989); and Bechtel Construction Company v. Secretary of Labor, 50 F.3d 926 (11th Cir. 1995).

Unspecified federal environmental laws: Pogue v. Department of Labor, 940 F.2d 1287 (9th Cir. 1991) (employee sent seven internal reports and a letter to her superior reporting environmental violations).

Clean Water Act: Passaic Valley Sewerage Commissioners v. United States Department of Labor, 992 F.2d 474 (3rd Cir. 1993) , cert. denied 510 U.S. 964 (1993) (pollution control chief of a sewage treatment plant wrote internal memoranda criticizing the plant's use of a water sampling technique). There Secretary of Labor found, and the Third Circuit affirmed, that the firing was in retaliation for the chief's internal memoranda, in violation of §507 of the Clean Water Act.

USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the Court of Appeals held that the Secretary's Regulations interpreting the term "proceeding" under § 507(a) of the Clean Water Act to include intra-corporate complaints was reasonable in light of the Act's remedial intent, 992 F.2d 474, 480.

Therefore, the Secretary of Labor advocates that "assisting . . . . in any other action to carry out the purposes" of a federal statute constitutes protected activity. The Courts of Appeals hold that the Secretary's interpretation is reasonable in light of the policies sought to be served by Congress. Neither the Regulations nor the Secretary nor the Courts of Appeals in those cases require the employee to "cross the line" from simply doing his or her job to taking an adversary position against the employer. Doing so, the courts have held, would be inimical to Congressional intent in passing the statutes there at issue.

The same is true in this case. The Court of Appeals' requirement that Petitioner step outside her role as Personnel Director conflicts with the pattern of enforcement that Congress intended to obtain under the Fair Labor Standards Act.

D.

ALLOWING THE COURT OF APPEALS' DECISION TO STAND WILL VIOLATE THE PUBLIC INTEREST.

The duty to enforce various provisions of the Fair Labor Standards Act has been accorded the dignity of a

"public right". Petitioner, therefore, had a congressionally-mandated duty founded upon the public interest to urge the corporation to comply with the provisions of Section 7 of the Act governing overtime pay to employees. By researching, documenting and voicing her concerns to her employer that Renberg's was not paying overtime pay to two broad categories of employees as required by the Act, the Petitioner was vindicating a public right. She cannot be required, as did the Court of Appeals, to step outside her role as Personnel Director in order to be protected under §15(a)(3) of the Act.

In Mourde v. Massachusetts Cities Realty Co., 47 F.Supp. 668 (D.Mass. 1942), the district court stated, in an action to recover overtime compensation and liquidated damages under the Act:

> It is true that an action under Section 16(b) is one to enforce a private or individual right. However, it is one in which the public has a decided interest. It is one method by which the congressional conception of public policy is enforced. [citing U.S. v. Darby, 312 U.S. 100 (1941), as amended 312 U.S. 657 (1941)]
>
> The main purpose of the entire Act is to maintain a decent standard of living for employees engaged in commerce or the production of goods for commerce. (citation omitted)
>
> Consequently, the liability of an employer under the Act is something more

> than a debt or liability to an individual. (citation omitted) An employee, exercising his rights under Section 16(b) of the Act, exercises them, not only for his own benefit, but for the benefit of the general public. Consequently, public policy demands that such exercise be not unnecessarily hampered.

47 F.Supp. 668, 670-71.

This Court has agreed that the rights invoked by an employee under the Act vindicate a congressionally-recognized public interest. In Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945), this Court considered the question of whether an employer may require its employees to waive their right to recover liquidated damages under the Fair Labor Standards Act. There the Court noted:

> Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate. With respect to private rights created by a federal statute, such as Section 16(b), the question of whether the statutory right may be waived depends upon the intention of Congress as manifested in the particular statute . . .
>
> Neither the statutory language, the legislative reports nor the debates indicates that the question at issue was specifically

> considered and resolved by Congress. In the absence of evidence of specific Congressional intent, it becomes necessary to resort to a broader consideration of the legislative policy behind this provision as evidenced by its legislative history and the provisions in and structure of the Act. . . . Such consideration clearly shows that Congress did not intend that an employee should be allowed to waive his right to liquidated damages.

324 U.S. 697, 704-6.

The Court went on to state:

> No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act. We are of the opinion that the same policy considerations which forbid waiver of basic minimum and overtime wages under the Act also prohibit waiver of the employee's right to liquidated damages.

324 U.S. 697, 707.

Given the public interest in the rights of employees to be paid their due under the Act, a personnel director who is attempting to vindicate these rights must be safe from retaliation. The Decision of the Court of Appeals threatens to violate public interest in the enforcement of the Act, and should therefore be reviewed by this Court.

E.

ALLOWING THE COURT OF APPEALS' DECISION TO STAND WILL THREATEN ENFORCEMENT OF THE FAIR LABOR STANDARDS ACT.

Congress specifically intended that employees should be free from the chilling effect of retaliation. As this Court noted in Mitchell v. DeMario, supra.:

> To an employee considering an attempt to secure his just wage deserts under the Act, the value of such an effort may pale when set against the prospect of discharge and the total loss of wages for the indeterminate period necessary to seek and obtain reinstatement.... We cannot read the Act as presenting those it sought to protect with what is little more than a Hobson's choice.

361 U.S. 288, 292-93.

A personnel director suffers no less from the weight of this "Hobson's choice" than the hourly worker. Unless the Court of Appeals' decision in this case is reversed, personnel directors will be unwilling to freely and openly discuss their concerns that their employer is violating the Act. The channels of internal communication will be "dried up" by employer intimidation, just as this Court noted in NLRB v. Scrivener, 405 U.S. 117, 122-23 (1972). The effective enforcement of the Act will thus be impaired, as no personnel

director will be willing to voice her concerns for fear of retaliation.

The Court need not fear that to adopt Petitioner's position in this case under these facts will improperly intrude upon an employer's rightful expectation of loyalty from its management team. The courts have properly carved out exceptions for the abusive, the disruptive and the disloyal employee, Kahn v. United States Secretary of Labor, 64 F.3d 271 (7th Cir. 1995); Smith v. Singer Company, 650 F.2d 214 (9th Cir. 1981); and Novotny v. Great American Federal Savings & Loan Association, 539 F. Supp. 437 (N.D. Penn. 1982). The Petitioner clearly acted totally within the confines of her duties as Personnel Director, and Respondents made no claim otherwise in the court below.

Neither should the Court fear that to announce the rule proposed by Petitioner will grant the personnel director some sort of "super-tenure" from which she cannot be fired. In the trial court, Respondents attempted to prove that Petitioner was terminated for valid reasons. The jury, as the Court of Appeals noted, "was not convinced". The jury system provides ample protection from any abuse.

Rather, by adopting the position that a personnel director expresses her belief of illegalities under the Act to her superiors is engaging in activity protected under the Act, the Court will further the effective enforcement of the Act. Personnel directors will be encouraged to raise their concerns within proper management channels, where the problem (if one exists) may best be addressed and corrected. If the concern is ill-founded and is the result of misunderstanding, management will have the opportunity to

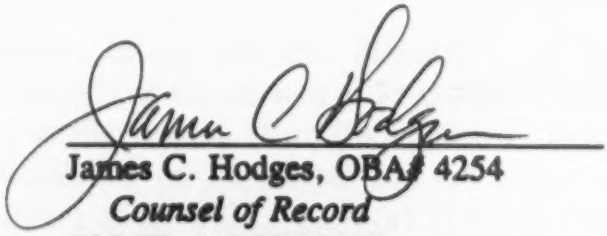
justify or explain its policies. The courts and the administrative channels available for complaints by employees will thereby be freed from needless claims which could have been handled more efficiently within the company itself.

In short, the protection of a personnel director from retaliation under these circumstances enhances the enforcement of the Fair Labor Standards Act. Leaving her unprotected will hamper and impair it.

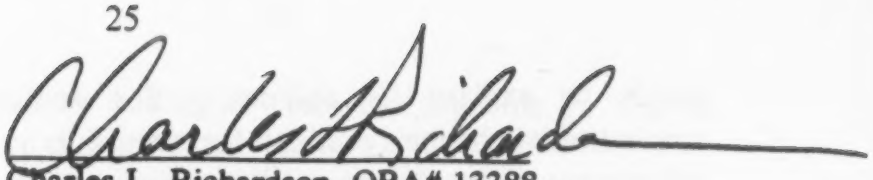
CONCLUSION

This Court should grant a writ of certiorari to the Court of Appeals to address this important issue. Upon further review, the Court should reverse the decision of the Court of Appeals and hold, as a matter of law, that the Petitioner in this case was engaging in activity protected under §15(a)(3) of the Fair Labor Standards Act when she reported to the company attorney and the president and principal owner of her employer her belief that the company was violating the Act.

Respectfully submitted,



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APPENDIX A - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA ENTERED SEPTEMBER ___, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 92-C-398-B

LORI G. MCKENZIE,
Plaintiff,

vs.

RENBERG'S, INC., and ROBERT L. RENBERG,
Defendants.

ORDER

The Court has for decision the motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50, or alternatively a motion for new trial pursuant to Fed.R.Civ.P. 59 (Docket #108) of the Defendants, Renberg's, Inc. and Robert L. Renberg.

The judgment herein for the Plaintiff, Lori G. McKenzie ("McKenzie"), in the amount of $103,966.00, was entered after a jury verdict finding Plaintiff's employment was terminated by Defendants on September 20, 1991, due to retaliation in violation of 29 U.S.C. § 215(a)(3) of the Fair

Labor Standards Act ("FLSA") [1].

Plaintiff, as personnel director of Defendant, Renberg's, Inc. (retail clothing business), following attendance at an FLSA-related seminar, had raised the issue approximately three weeks before her termination that perhaps certain management and/or commissioned sales employees were being denied overtime compensation in violation of the ELSA. The parties agreed that discharging the Plaintiff for said conduct would be a violation of 29 U.S.C. § 215(a)(3).

As nonpretextual legitimate reasons for Plaintiff's termination, Defendants offered evidence that Plaintiff, as personnel director, had improperly disclosed confidential information, and additionally, had participated in notarizing a written quid pro quo employment-related contract for sexual favors. The Defendants deny that Plaintiff, an at-will employee, was discharged in retaliation for her raising the FLSA matter.

Concerning an employee disseminating confidential information, even when done in support of a discrimination

---

[1] 29 U.S.C. § 215 **Prohibited acts; prima facie evidence**

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person--

* * *

(3) to discharge or in any other manner because such employee has file any complaint or instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, o has served or is about to serve on an industry committee; * * *"

charge, numerous cases have found that this and disloyalty is a legitimate reason for employee discharge. Jefferies v. Harris Cty. Community Action Ass'n, 615 F.2d 1025, 1036 (5th Cir. 1980); O'Day v. McDonnell Douglas Helicopter Co.,784 F.Supp. 1466, 1470 (D.Ariz. 1992); Baker v. Georgia Power Co., 27 Fair Empl. Prac. Cas. (BNA) 1301 (N.D.Ga. 1980); Herrera v. Mobil Oil. Inc., 53 Fair Empl. Prac.Cas. (BNA) 1406 (W.D.Tex. 1990); and Hamm v. Members of the Board of Regents of the State of Florida, 708 F.2d 647, 653 (11th Cir.1983).

Defendants also asserted defensively that the FLSA was integral to Plaintiff's job as personnel director, so any communications on the subject of the FLSA by Plaintiff could not be considered protected activity for purposes of a retaliation discharge claim. In support of this position, Defendants submit two law review articles: 35 S.Tex.L.Rev., No. 1, January 1994, p. 95, and B.C.L.Rev. Vol. 29:347. p. 391.

29 U.S.C. § 215(a)(3) protects all employees from being terminated for speaking up regarding good faith FLSA violations. This would include the Plaintiff as Renberg's, Inc., personnel director as well. Her position as personnel director should not be a *per se* exemption from § 215(a)(3) prohibition against a retaliatory discharge. See, Harris v. First National Bank of Hutchinson, Kansas, 680 F.Supp. 1489 (D.Kan. 1987); Harris v. Board of Public Util., 757 F.Supp. 1185 (D.Kan. 1991); and Francoeur v. Carroon & Black Company, 552 F.Supp. 403 (S.D.N.Y. 1982). Thus, the court concludes Plaintiff's conduct herein regarding reporting the possible FLSA violation is protected activity under § 215(a)(3).

In their motion for judgment as a matter of law, Defendants also assert that Plaintiff did not present evidence of pretext joining issue with Defendants' legitimate nondiscriminatory reasons for discharging Plaintiff. This failure, urged Defendants, entitles them to a judgment as a matter of law. Saint Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); Hooks v. Diamond Crystal Specialty Foods, Inc., 997 F.2d 793, 798 (10th Cir. 1993); Lovelace v. Sherwin-WilliamsCo., 681 F.2d 230, 242 (4th Cir. 1982); and Odima v. Westin Tucson Hotel Co., 991 F.2d 595, 600 (9th Cir. 1993). Thus, under Fed.R.Civ.P. 50, the court must determine from the record whether sufficient probative evidence exists to permit the trier of fact to decide the issue of pretext. Wright & Miller, Federal Practice & Procedure §2524 (1st ed. 1971).

Concerning Plaintiff's discharge due to retaliation in violation of 29 U.S.C. § 215(a)(3), for her good faith raising of possible FLSA violations, the Court does not consider it necessary to analyze in depth all of the trial evidence joining issue with Defendants' proffered legitimate nondiscriminatory reasons of Plaintiff's breaches of confidential information as pretextual[2].

Suffice it to say that when all of the evidence is viewed

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[2] As long as the employee's protected activity complaint is in good faith, although centered in a mistake of fact, the employer is not permitted to retaliate. Love v. Re/Max of America, Inc., 738 F.2d 383, 385 (10th Cir. 1984).

in a light favorable to Plaintiff, and all reasonable inferences are granted thereto, the evidence is sufficient to submit the issue to the trier of fact[3].

The more compelling fact in this regard is the timing of Plaintiff's discharge being two to three weeks following her suggesting to Renberg's, Inc., management that perhaps there were FLSA violations. In the recent case of Candelaria v. E G & G Energy Measurements, Inc., 1994 WL 474233 (10th Cir. 1994), the court stated:

> "We are mindful that a retaliatory motive can be inferred from the fact that an adverse employment action follows charges by an employee against his/her employer. Such an inference can only be made, however, where 'close temporal proximity' exists between the bringing of charges and the subsequent adverse action. Smith v. Maschner, 899 F.2d 940, 948-49 (10th Cir. 1990)...."

See also, Miller v. Fairchild Industries, Inc., 797 F.2d 727, 731-33 (9th Cir. 1986), McDonald v. Hall, 610 F.2d 16, 18 (1st Cir. 1979), and Harris v. Fleming, 839 F.2d 1232, 1236-38 (7th Cir. 1988).

However, the evidence regarding Plaintiff's

---

[3] This is even in the face of Plaintiff's testimony that she had no evidence to refute that reasons given for her discharge were based on Defendant Robert L. Renberg's good faith reasonable belief that Plaintiff had engaged in employment-related misconduct (Tr. 178).

participation in the written *quid pro quo* contract for sexual favors presents a different matter. If this nonpretextual reason standing alone would support employment termination, a judgment as a matter of law is appropriate even though a factual issue exists regarding alleged retaliation pursuant to 29 U.S.C. § 215 (a) (3). Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

The relevant evidence concerning the *quid pro quo* sexual favor contract is as follows: In 1989, Plaintiff was the Renberg's, Inc., personnel director. As such, it was her job function to be involved with the hiring of retail sales personnel and she was the Renberg's, Inc., affirmative action officer concerning sexual discrimination and harassment. Plaintiff was also a notary public, and notarized Defendants' Exhibit 1 which states as follows:

> "September 26, 1989
>
> Brenda Jagels
> Dean Witter Reynolds
> 100 West 5th
> Suite 600
> Tulsa, OK 74103
>
> Dear Brenda,
>
> The purpose of this letter is to outline the terms of the agreement we reached in conversation Monday night September 25, 1989.

"AREA OF CONTENTION: Renberg's Christmas Bonus

TERMS OF THE AGREEMENT: Should Christmas bonuses not be paid in their usual manner to the employees of Renberg's, Inc., a company operating in Tulsa, Oklahoma, then David Childers will provide Brenda Jagels with the following:

(1) Fendi Parfum 1/4 oz
(1) Fendi EDT
(1) Fendi Body Lotion or Creme
(1) Erno Laszlo Eye Creme

However, should Christmas bonuses be paid then Brenda Jagels will provide David Childers with a very special and provocatively intimate evening; time, place and duration to be negotiated.

PAYMENT: Made on or before December 25, 1989."

Brenda, this letter is intended to be a binding contract. Please signify your agreement with the foregoing provisions by signing below and returning one copy for my file.

Sincerely,

/s/ David R. Childers
311 South Main
Tulsa, OK 74103

Accepted and agreed to this _____ day of _____ 1989.

/s/ Brenda S. Jagels
Brenda Jagels

Witnessed before me on this the 27 day of September, 1989.

/s/ Lori G. McKenzie
My commission expires _____, 198_."
(month, date and year unclear)

David R. Childers, at the time of Defendants' Exhibit 1, was a Renberg's, Inc., retail clothing store manager who was seeing Brenda Jagels socially. Brenda Jagels was a former Renberg's, Inc. employee who was an "on-call" Renberg's, Inc., employee during the holiday season.

In August 1991, David R. Childers ceased employment with Renberg's, Inc., and moved to the state of Washington. When Childers' Renberg's, Inc., desk was cleaned out, Defendants' Exhibit 1 was found therein. Robert Renberg testified that in late August or early September 1991, Defendants' Exhibit 1 was brought to his attention. In addition to Plaintiff's breaches of confidential personnel information, Robert Renberg concluded that Plaintiff's involvement with

Defendants' Exhibit 1, an employee *quid pro quo* sexual favor contract, was also justification for Plaintiff's discharge. When Robert Renberg terminated Plaintiff on September 20, 1991, he advised her he was discharging her as an employee because he had lost confidence in her.

Clearly, Defendants' Exhibit 1 alludes to a type of *quid pro quo* employee sexual favor contract that is condemned by Title VII, 42 U.S.C. § 2000(e) *et seq*; Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 91 L.Ed.2d 49, 106 S.Ct. 2399 (1986). The facts that Childers and Jagels signed Defendants' Exhibit 1, and that it was notarized before Plaintiff in the latter part of September, 1989, were undisputed. In Plaintiff's deposition she admitted reading Defendants' Exhibit 1 before she notarized it. (Tr. 191-192). At trial Plaintiff recanted her deposition testimony and said she had misunderstood the question, thinking the question was whether she had read Defendants' Exhibit 1 before at any time. (Tr. 191). In a filing with the court prior to trial, Plaintiff said, "Further Plaintiff admits that she read the document that she notarized but there was no evidence that Plaintiff approved of such contents of the document, only that she witnessed that two individuals signed a private noncompany-related document." (Tr. 193). It is disingenuous to assert that Defendants' Exhibit 1 is not company related when it proposes to exchange a company Christmas bonus for "a very special and provocatively intimate evening."

Concerning Defendants' Exhibit 1, Plaintiff testified as follows:

"Q. Now, in September of 1989, at that point you were the personnel director?

A. At what point?

Q. September of 1989.

A. Yes, I was.

Q. You weren't an assistant personnel director; you were the personnel director?

A. Yes.

Q. And wouldn't it be safe to assume that everybody in the company knew that?

A. Yes.

Q. And you were responsible for the Company's obligations in employment matters, were you not?

A. Yes.

Q. And you were responsible regarding matters of sexual harassment, were you not?

A. Yes.

Q. It was part of your responsibility, was it not, to

assure that there was a non-hostile work environment at the Renberg's stores, was it not?

A. Yes.

Q. And you were the person that if someone at the company felt they were a victim of harassment or a hostile work environment, they were supposed to come to you and tell you, right?

A. Yes.

Q. And when they came to you, then you were to investigate the matter and determine whether or not they had been harassed?

A. Yes.

Q. And if they had been harassed, you were to take care of the discipline on that?

A. Yes. (Tr. 181-183)

* * *

Q. Down here under the terms of the agreement under the 'however' paragraph it says, 'However, should Christmas bonuses be paid, then Brenda Jagels will provide David Childers with a very special, provocative, intimate evening, time, place and duration to be

negotiated.'

Now, does not on its face of that exhibit, that's exchanging sexual favors for a Christmas bonus. It's on the face of the document.

A. That's what it says.

Q. So you agree with me on its face that would be an illegal agreement under the law.

A. Yes. She was not an employee, but --

Q. It doesn't say that, does it?

A. No, it doesn't.

Q. It says will pay a Christmas bonus, and if you get paid a Christmas bonus, basically I get you, right?

A. That's what it says. (Tr. 195).

* * *

Q. So whether a statement is serious or is a joke, it can have the same bad effects, can it not?

A. It could.

Q. And from a third-party standpoint, if they're

offended it doesn't matter whether it's real or was a joke, does it?

A. True.

Q. So if you have someone other than Brenda out here, they could be offended by what they see happening in this instance, couldn't they?

A. Yes.

Q. And the mere fact that the parties to the transaction, who may find it acceptable, that still could impact another employee, couldn't it?

A. Yes.

Q. That could create -- be a part of what creates a hostile work environment for that third employee.

A. Yes.

Q. Call her Mary. Mary sees people having these kinds of agreements, she may believe she had a sexually charged work environment, may she not?

A. Yes.

Q. She's saying I'm not getting ahead, I'm not

getting these Christmas bonuses because I'm not being signed up for these agreements.

A. We're not talking about an employee, though, in this agreement.

Q. You testified that she had been employed and was an on-call employee at this time.

A. Yes.

Q. And there is nothing on this agreement that says, oh, by the way, I'm not an employee of Renberg's.

A. No, it does not. (Tr. 186-187)

* * *

Q. But your signature is there, is it not?

A. Yes, it is.

Q. And everybody knows you're the personnel director.

A. Yes, they do.

Q. You don't cease being personnel director when you notarize something, do you?

A. No.

Q. And looking at that document, does it not concern you that if some other employee saw that, it would appear that the personnel director is endorsing that kind of document that you yourself believe is improper?

A. It could.

Q. And you understand that such a document as this could be very damaging to Renberg's in any litigation during a sexual harassment or sexual discrimination?

A. Yes.

Q. This could put the company at risk.

A. Yes.

Q. And you don't deny that you signed it?

A. No, I do not.

Q. You notarized this at work, right?

A. Yes, I did. (Tr. 189)

* * *

Q. Is there anything on the face of that contract that would indicate to Bob Renberg that you didn't read it?

A. No.

Q. Is there anything on the face of that document that would indicate to Bob Renberg that that was a joke?

A. No.

Q. Do you regreat (sic) that your signature is on there?

A. Yes, I do.

Q. Do you believe it was mistake that it was on there?

A. I did make a mistake signing it, yes.

Q. Do you have any reason to believe that Bob Renberg was not upset by this?

A. No.

Q. The mere passage of time doesn't make it any less wrong, does it?

A. No." (Tr. 190-191)

Because of a handwritten date on the top right corner of a copy of Defendants' Exhibit 1 (Plaintiff's Exhibit 13), Plaintiff asserted at trial that Robert Renberg did not learn of the *quid pro quo* sexual favor contract (Defendants' Exhibit 1) until October 1991, approximately a month after Plaintiff's discharge. However, the law of this circuit is clear that after-acquired information that supports an employee's discharge may be relevant to uphold the employer's termination action. In Summers v. State Farm Mutual Automobile Insurance Co., 864 F.2d 700, 706 (10th Cir. 1988), the court cited Blalock v. Metals Trades, Inc., 775 F.2d 703, 712 (6th Cir. 1985), which stated an employer could avoid liability under Title VII by showing "that the adverse employment action would have been taken even in the absence of the impermissible motivation, and that, therefore, the discriminatory animus was not the cause of the adverse employment action." *See also*, O'Driscoll v. Hercules Inc., 12 F.3d 176, 178-79 (10th Cir. 1994), and Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1427 (10th Cir. 1993).

The testimony of Robert Renberg was that he was genuinely concerned with and could not condone Plaintiff's participation in Defendants' Exhibit 1. He testified that it was also a reason for Plaintiff's discharge. Plaintiff agreed that Robert Renberg, as president of Renberg's, Inc., could be expected to be upset over the implications of Defendants' Exhibit 1 for Renberg's, Inc. Even if Plaintiff did not read Defendants' Exhibit 1, as personnel director it was her job to supervise such personnel hiring arrangements and she was in charge of company affirmative action to prevent unlawful discrimination. Robert Renberg was within his rights as

president of Renberg's, Inc., to discharge Plaintiff because of her involvement in notarizing Defendants' Exhibit 1.

For the reasons set forth above, the Defendants' motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50 is hereby SUSTAINED and the judgment entered herein in favor of Plaintiff against the Defendants on the 19th day of July, 1994, is set aside. Defendants' alternative motion for new trial pursuant to Fed.R.Civ.P. 59 is, therefore, moot. Contemporaneous with the filing of this order a separate judgment is entered in favor of the Defendants, Renberg's, Inc. and Robert L. Renberg, and against the Plaintiff, Lori G. McKenzie.

DATED this _____ day of September, 1994.

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPENDIX B - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED SEPTEMBER 4, 1996

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 94-5197

LORI G. McKENZIE,
Plaintiff-Appellant,

v.

RENBERG'S INC., and ROBERT RENBERG,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 92-C-398-B)

James C. Hodges of Eller & Detrich, Tulsa, Oklahoma (Charles L. Richardson and Brad Smith of Richardson & Stoops, with him on the brief) for Plaintiff/Appellant.

Larry D. Henry of Arrington, Kihle, Gaberino & Dunn, Tulsa,

Oklahoma (Patrick W. Cipolla, with him on the brief) for Defendants/Appellees.

Before SEYMOUR, Chief Judge, TACHA and EBEL, Circuit Judges.

EBEL, Circuit Judge.

Plaintiff-Appellant Lori G. McKenzie brought this action against her former employer, Renberg's Inc., and its president, Robert Renberg (collectively "defendants"), asserting claims for retaliatory discharge in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 215(a)(3), and wrongful discharge in violation of Oklahoma public policy. The district court dismissed McKenzie's state law wrongful discharge claim prior to trial under Fed. R. Civ. P. 12(b)(6). McKenzie received a favorable jury verdict on her retaliation claim, but the district court thereafter entered judgment as a matter of law for defendants. McKenzie now appeals these two rulings[4].

We have jurisdiction under 28 U.S.C. § 1291 and we affirm[5].

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[4] McKenzie also appeals: (1) the district court's refusal to enter judgment on the emotional distress and punitive damages awarded her by the jury on the FLSA claim; (2) the reduction of her FLSA back pay award; and (3) the denial of front pay. However, we need not reach those issues.

We hold that McKenzie did not engage in protected activity under § 215(a)(3) when, in her capacity as personnel director, she undertook to advise Renberg's that its wage and hour policies were in violation of the FLSA.

BACKGROUND

Renberg's, Inc. ("the company") hired McKenzie as a receptionist in July 1984. She was promoted to Assistant Personnel Director in October 1984, and in May 1985, she became the company's Personnel Director. As Personnel Director, McKenzie was responsible for monitoring compliance with state and federal equal employment opportunity laws, wage and hour laws, and other laws regulating the workplace.

In August 1991, a co-worker of McKenzie, Marsha McElroy, attended a seminar on wage and hour laws and returned with various informational materials. McElroy gave these materials to McKenzie, who, after reviewing them, became concerned that certain employees of the company were not receiving proper compensation for working overtime. McKenzie discussed the matter with McElroy, and then decided to disclose her concerns to the company attorney, Steve Andrew. McKenzie and McElroy met with Andrew on September 4, 1991, and later that same day, McKenzie also discussed the wage and hour problem with Robert Renberg

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[5] The Court also has before it the defendants' motion for sanctions. We have considered the arguments therein and hereby deny the motion.

("Renberg"), the company president. Sixteen days later, on September 20, 1991, McKenzie was terminated by Renberg.

Believing she had been retaliated against for reporting the company's possible wage and hour violations, McKenzie filed suit in the United States District Court. In her complaint, McKenzie asserted an FLSA retaliatory discharge claim under 29 U.S.C. § 215(a)(3). This statutory provision makes it unlawful for an employer to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3).

McKenzie also asserted a state law claim for wrongful discharge in violation of Oklahoma public policy, see Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989)[6]

The district court dismissed the Burk public policy claim under Fed. R. Civ. P. 12(b)(6). The FLSA retaliation claim was tried to the jury.

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[6] McKenzie also brought a state law claim for intentional infliction of emotional distress and a federal claim of sex discrimination under Title VII. The emotional distress claim was dismissed prior to trial in an order from which McKenzie does not appeal. McKenzie's Title VII claim apparently was abandoned prior to trial (see District Court's Pretrial Order, Aplt. App. at 1-2) and therefore we do not address it in this appeal.

The parties vigorously disputed the facts at trial. McKenzie testified that the defendants were not very open to her concerns about the company's possible FLSA violations. According to McKenzie's testimony, Andrew seemed not to understand her concerns and would not examine the seminar materials she had brought to the September 4, 1991 meeting. McKenzie testified that at one point in the meeting, Andrew drew a line on a legal pad--apparently representing the symbolic line between "right" and "wrong"--and indicated to McKenzie that he was not afraid to cross that line. After the meeting with Andrew, McKenzie spoke with Renberg. McKenzie testified that Renberg also seemed indifferent to the wage and hour problem. She had the impression that Renberg had already spoken to Andrew about the FLSA issue. McKenzie testified that after these meetings she began to feel uneasy and feared for her job.

McKenzie testified that her uneasiness continued during the next few weeks, as Andrew would not return her repeated phone calls. On September 20, 1991, Renberg came to McKenzie's office and fired her. McKenzie testified that Renberg's only stated reason for firing her was his "loss of confidence" in her. McKenzie later discovered that she had been under investigation by an internal security officer since September 12, 1991, eight days after she first reported the FLSA violations to Andrew. Renberg testified that he had personally requested the investigation of McKenzie, and that McKenzie was the only employee he specifically remembered ever having asked to be investigated. Finally, McKenzie testified that she had received no warnings or complaints from

the defendants about her performance, despite a general company policy that required progressive counseling about performance problems before termination.

The defendants disputed much of McKenzie's testimony at trial. Andrew testified that the company did not have a progressive discipline system in place, nor did it have an employee's manual at the time of McKenzie's discharge. In addition, the defendants sought to rebut McKenzie's claim of retaliation by offering evidence that Marsha McElroy, who attended the FLSA seminar and who also raised the possible FLSA violations with Andrew, was not terminated.

Renberg denied that McKenzie's discharge was in retaliation for her protected FLSA activity. Renberg testified that he fired McKenzie for two legitimate reasons:

(1) for disclosing confidential information in her role as personnel director[7]; and,

(2) for notarizing a "contract" between two company employees for sexual favors.

The "contract," which was entered into by Brenda Jagels, an on-call sales clerk, and David Childers, a company vice-president, provided in relevant part as follows:

AREA OF CONTENTION: **Renberg's Christmas Bonus**

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[7] The alleged breaches of confidentiality involved McKenzie disclosing the names of company employees suspected of criminal activity and divulging the impending demotion of a department manager.

TERMS OF THE AGREEMENT: Should Christmas bonuses not be paid in their usual manner to the employees of Renberg's Inc., a company operating in Tulsa, Oklahoma, then David Childers will provide Brenda Jagels with the following:

(1) Fendi Parfum 1.4 oz.
(1) Fendi EDT
(1) Fendi Body Lotion or Creme
(1) Erno Laszlo Eye Creme

However, should Christmas bonuses be paid then Brenda Jagels will provide David Childers with a very special and provocatively intimate evening; time, place and duration to be negotiated.

PAYMENT: Made on or before December 25, 1989.

Brenda, this letter is intended to be a binding contract. Please signify your agreement with the foregoing provisions by signing below and returning one copy for my file.

At trial, McKenzie admitted that she had notarized the sex contract, but stated that she had neither read it nor was aware of its content when she notarized it. McKenzie also admitted that she had made a mistake by notarizing the contract.

The trial was conducted in three stages, with the question of FLSA liability decided first, followed by the jury's

determination of back pay and compensatory damages, and finally, of punitive damages. After the liability phase, the jury concluded that the defendants' asserted non-retaliatory reasons for discharging McKenzie were pretextual and returned a special interrogatory finding that McKenzie was terminated in retaliation for reporting her belief that Renberg's was in violation of the Fair Labor Standards Act. After the two damages phases of the trial, the jury returned verdicts awarding McKenzie $100,000 in back pay, $175,000 in emotional distress damages, and $50,000 in punitive damages. The district court deferred entry of judgment on the jury's verdict and ordered further briefing from the parties on the question whether emotional distress and punitive damages were authorized under the FLSA. On July 15, 1994, the district court issued its findings of fact and conclusions of law, pursuant to which the court: (1) reduced McKenzie's back pay award to $50,983.04; (2) granted McKenzie an additional equal amount of $50,983.04 as liquidated damages; (3) denied McKenzie's request for front pay under the equitable doctrine of "unclean hands"; and (4) (apparently) ruled that emotional distress and punitive damages were not available under the FLSA as a matter of law.

After the district court entered a corresponding judgment in favor of McKenzie, the defendants filed a Motion for Judgment as a Matter of Law under Fed. R. Civ. P. 50, or in the alternative, a Motion for New Trial under Fed. R. Civ. P. 59. The district court granted the Motion for Judgment as a Matter of Law, and ruled that the Motion for New Trial was moot. McKenzie now appeals.

DISCUSSION

I. Motion for Judgment as a Matter of Law

McKenzie first challenges the district court's decision to grant the defendants judgment as a matter of law on her FLSA retaliation claim. We review de novo the grant or denial of a motion for judgment as a matter of law, applying the same legal standard as the district court. Clark v. R.E.L. Prods., Inc., 972 F.2d 317, 317 (10th Cir. 1992). In conducting this review, we must determine whether, "'viewing the evidence in the light most favorable to the nonmoving party, the evidence and the inferences to be drawn from it are so clear that reasonable minds could not differ on the conclusion.'" Pytlik v. Professional Resources, Ltd., 887 F.2d 1371, 1380 (10th Cir. 1989) (quoting Guilfoyle v. Missouri, Kansas & Texas R.R. Co., 812 F.2d 1290, 1292 (10th Cir. 1987)). Judgment as a matter of law may be granted under Fed. R. Civ. P. 50 "only if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion." FDIC v. United Pac. Ins. Co., 20 F.3d 1070, 1079 (10th Cir. 1994). Applying this standard, we affirm the judgment of the district court, although we do so on a different ground than that relied upon below.

A.

The Tenth Circuit applies a "motivating factor" analysis to claims of retaliatory discharge under § 215(a)(3) of the FLSA: "When the 'immediate cause or motivating factor of a discharge

is the employee's assertion of statutory rights, the discharge is discriminatory under § 215(a)(3) whether or not other grounds for discharge exist.' If retaliation is not the motivating factor, then the discharge is not unlawful." Marx v. Schnuck Markets, Inc., 76 F.3d 324, 329 (10th Cir.) (quoting Martin v. Gingerbread House, Inc., 977 F.2d 1405, 1408 (10th Cir. 1992)), cert. denied, 116 S. Ct. 2552 (1996). The motivating factor test is equivalent to a "but for" inquiry--a discharge is unlawful under § 215(a)(3) "only if it would not have occurred but for the retaliatory intent." Martin, 977 F.2d at 1408 n.4.

We believe the jury verdict rendered in this case is dispositive of the retaliation issue. At trial, the jury was presented with McKenzie's evidence of retaliation, as well as the defendants' evidence regarding their asserted non-retaliatory reasons for the discharge. The trial judge correctly instructed the jury that McKenzie bore the burden of proving that her FLSA activity was the "motivating factor" in the termination decision and that she would not have been discharged "but for" the defendants' retaliatory intent. See Martin, 977 F.2d at 1408 & n.4. In this regard, the jury was told that if it found McKenzie would have been terminated regardless of her FLSA activity, then it was required to find in favor of the defendants. See Reich v. Davis, 50 F.3d 962, 966 (11th Cir. 1995) (holding that under the "but for" test, a retaliation Plaintiff cannot prevail if she "would have suffered exactly the same adverse action even if [she] had not engaged in FLSA activities"). After being given these instructions, the jury returned a special interrogatory finding that McKenzie was terminated because of her FLSA activity. The jury therefore rejected the defendants' asserted non-retaliatory reasons and found that unlawful

retaliation was the "but for" cause of McKenzie's discharge[8]

Despite the jury's express finding of retaliatory intent, the district court granted the defendants' motion for judgment as a matter of law. The district court reasoned that because the defendants would have been justified in discharging McKenzie for notarizing the sex contract, they could not be held liable under the FLSA even if they had unlawfully retaliated against McKenzie. In the district court's view, the sex contract provided an independent lawful justification for McKenzie's discharge which trumped any retaliatory motive on the defendants' part:

> [W]hen all of the evidence is viewed in a light favorable to Plaintiff, and all reasonable inferences are granted thereto, the evidence is sufficient to submit the issue to the trier of fact. . . . However, the evidence regarding Plaintiff's participation in the written quid pro quo contract for sexual favors presents a different matter. If this nonpretextual

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[8] In its Findings of Fact and Conclusions of Law, the district court acknowledged the jury's rejection of the defendants' asserted non-retaliatory reasons:

> The jury found that the Plaintiff was willfully and intentionally retaliated against and terminated by Defendants on September 20, 1991, because she had communicated good faith concerns regarding possible FLSA violations by Renberg's, Inc. The jury concluded Defendants' proffered reasons for Plaintiff's termination were pretextual.

Aplt. App. at 27-28 (emphasis added).

> reason standing alone would support employment termination, a judgment as a matter of law is appropriate even though a factual issue exists regarding alleged retaliation pursuant to 29 U.S.C. § 215(a)(3).

(Aplt. App. at 37-38.)

Under the district court's approach, the dispositive question is whether the defendants would have been justified in terminating McKenzie for notarizing the sex contract. This approach, however, disregards both the jury's express findings of fact and the "but for" test of causation. Under the "but for" standard, only those employees "who would have suffered exactly the same adverse action even if they had not engaged in FLSA activities will be unprotected. . . ." Davis, 50 F.3d at 966 (emphasis added). Thus, the mere existence of a non-retaliatory motive that would justify an employee's discharge does not absolve an employer of liability for a retaliatory employment decision; rather, the employer must actually rely on that non-retaliatory reason as the sufficient, motivating reason for the employment decision. As the Supreme Court recently stated, "proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made." McKennon v. Nashville Banner Pub. Co., 115 S. Ct. 879, 885 (1995) (omission in original) (quotation omitted). In other words, an employer may not prevail "by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision." Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) (plurality opinion) (involving a mixed-motive situation). Here, the defendants were given the opportunity at trial to

persuade the jury that McKenzie was terminated not for reporting her wage and hour concerns, but for notarizing the sex contract. The jury, however, was not convinced. The jury instead found that the "but for" cause of McKenzie's discharge was her FLSA activity, and that the defendant's asserted "sex contract" rationale was a pretext. Given these findings of fact, it is immaterial whether the defendants would have been justified in discharging McKenzie for notarizing the sex contract, as the jury concluded she was not actually discharged for this reason.

B.

The district court erred in another important respect as well. At trial, McKenzie argued that Renberg was not aware of the existence of the sex contract until after he terminated her, and thus could not have relied on the contract in making his decision. To support her argument, McKenzie offered into evidence a copy of the sex contract with a handwritten date of "10/7/91" in the upper right-hand corner--a date approximately three weeks after McKenzie was terminated. Renberg, on the other hand, testified that a copy of the document was discovered and turned over to him sometime prior to McKenzie's termination .

The district court avoided this potential factual

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[9] In his deposition, Renberg testified that he first was given a copy of the sex contract sometime between March and September of 1991. At trial, however, Renberg testified that he first saw the document just a few days before he fired McKenzie.

complication by invoking the so-called "Summers doctrine." See generally Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988) (holding that an employer may avoid liability for a discriminatory discharge if, subsequent to the employee's discharge, the employer discovers evidence of wrongdoing that would have led to the employee's termination on lawful and legitimate grounds). In ruling on the defendants' motion for judgment as a matter of law, the district court applied Summers and reasoned that even if Renberg did not learn of the sex contract until after McKenzie's discharge, defendants nevertheless could rely on the sex contract to justify their termination decision.

While the district court's reasoning may have been consistent with our precedents at the time, the Summers doctrine has since been rejected. Shortly after the district court's decision in this case, the Supreme Court decided McKennon v. Nashville Banner Pub. Co., 115 S. Ct. 879 (1995). In McKennon, the Court specifically disapproved of our decision in Summers and held that an employer's after-acquired evidence of misconduct cannot operate to bar an employee's discrimination action. See 115 S. Ct. at 885 ("The employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason."). Thus, the district court's reliance on Summers was in error.

C.

Notwithstanding the district court's errors, defendants urge us to affirm the judgment on two grounds not relied upon

below. "An appellee may defend the judgment won below on any ground supported by the record." In re Robinson, 921 F.2d 252, 253 (10th Cir. 1990); see also United States v. Sandoval, 29 F.3d 537, 542 n.6 (10th Cir. 1994) (appellate court may "'affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court'") (quoting Medina v. City and County of Denver, 960 F.2d 1493, 1495 n.1 (10th Cir. 1992)). Defendants argue that judgment as a matter of law was properly granted in their favor because: (1) McKenzie's conduct was not protected activity under § 215(a)(3); and (2) McKenzie failed to present sufficient evidence at trial to support the jury's finding of retaliation. Because we agree with the first of these propositions, we need not reach the second.

Defendants argue that McKenzie's act of reporting her good faith concerns about the company's possible wage and hour violations was not sufficient to trigger the protections of § 215(a)(3) .

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[10] The instruction to the jury on protected activity included the following statement: "The parties have stipulated that Plaintiff complained about practices she in good faith believed may have been unlawful under the Fair Labor Standards Act. The parties herein agree that good faith reporting or communicating concerns regarding possible FLSA violations is protected activity." (Jt. 2d Supp. App., Tab A.) While this "stipulation" would appear to preclude defendants' from arguing on appeal that McKenzie did not engage in protected activity, it is apparent from the colloquy between defense counsel and the trial judge that defendants neither agreed to this instruction nor entered into such a stipulation. Indeed, defendants repeatedly objected to the form of the protected activity instruction, and although the court overruled their objections, it did acknowledge on several

According to defendants, McKenzie was not asserting any rights under the FLSA but rather was merely performing her everyday duties as personnel director for the company. Section 215(a)(3) makes it unlawful for an employer to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3).

Although this provision specifically lists the types of activities which are protected from retaliation, we have held that § 215(a)(3) also protects employees who articulate a good faith, though unproven, belief that the employer is violating their rights under the FLSA. Love v. RE/MAX of Am., Inc., 738 F.2d 383, 387 (10th Cir. 1984). We also have held that § 215(a)(3) "applies to the unofficial assertion of rights through complaints at work." Id.

Despite our expansive interpretation of § 215(a)(3), we

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occasions that the issue was preserved for appeal. See, e.g., Jt. 2d Supp. App. at 510 ("[U]nderstanding you're very much interested in preserving that point for purposes of the beyond here, that is for appellate purposes—and I understand that, and you've raised it . . . ."); id. at 511 ("[C]an't we stipulate under the theory that I'm submitting it to the jury, certainly preserving your right to say, Judge, you're wrong . . . ."); id. at 512 ("[G]iving you the right to preserve your objection . . . . and certainly preserving your right to keep your issue for purposes of appeal alive . . . ."). In light of these statements, we do not deem the argument waived.

have never held that an employee is insulated from retaliation for participating in activities which are neither adverse to the company nor supportive of adverse rights under the statute which are asserted against the company. Indeed, the contrary conclusion follows directly from our decision in Love, where we held that in order to be protected under § 215(a)(3), an employee need not file an official complaint or institute an FLSA proceeding, so long as the employee makes a "good faith assertion of [one's] statutory rights." 738 F.2d at 387 (emphasis added); see also EEOC v. Romeo Community Schs., 976 F.2d 985, 989 (6th Cir. 1992) (per curiam) ("The Love Court held that it is the assertion of statutory rights that is the triggering factor, not the filing of a formal complaint. This view is in accord with other circuits.") (collecting cases). Thus, it is the assertion of statutory rights (i.e., the advocacy of rights) by taking some action adverse to the company--whether via formal complaint, providing testimony in an FLSA proceeding, complaining to superiors about inadequate pay, or otherwise--that is the hallmark of protected activity under § 215(a)(3).

Here, McKenzie never crossed the line from being an employee merely performing her job as personnel director to an employee lodging a personal complaint about the wage and hour practices of her employer and asserting a right adverse to the company. McKenzie did not initiate a FLSA claim against the company on her own behalf or on behalf of anyone else. Rather, in her capacity as personnel manager, she informed the company that it was at risk of claims that might be instituted by others as a result of its alleged FLSA violations. In order to engage in protected activity under § 215(a)(3), the employee

must step outside his or her role of representing the company and either file (or threaten to file) an action adverse to the employer, actively assist other employees in asserting FLSA rights ,

or otherwise engage in activities that reasonably could be perceived as directed towards the assertion of rights protected by the FLSA. Here, McKenzie did none of these things. Indeed, McKenzie testified that her job responsibilities included participating in wage and hour issues. There is no evidence in the record to suggest that McKenzie was asserting any rights under the FLSA or that she took any action adverse to the company; rather, the record reflects that McKenzie's actions in connection with the overtime pay issue were

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[11] The Tenth Circuit has not addressed whether § 215(a)(3) protects actions taken by an employee on behalf of other employees. In Title VII cases, the "opposition" clause contained in that statute's antiretaliation provision, 42 U.S.C. § 2000e-3(a), protects conduct by an employee who is not the direct victim of a practice made unlawful under Title VII, but who "opposes" such discrimination against others. Sumner v. United States Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990); see, e.g., Eichman v. Indiana State Univ. Bd. of Trustees, 597 F.2d 1104, 1107 (7th Cir. 1979) (protecting a man who assisted a female co-worker in asserting her right to be free from sex discrimination); Jones v. Lynn, 669 F. Supp. 1108, 1121 (D.D.C. 1986) (same). While the FLSA contains no similar "opposition" clause, we assume, without deciding, that the language of § 215(a)(3) is sufficiently broad to encompass conduct taken on behalf of others. See, e.g., 29 U.S.C. § 215(a)(3) (making it unlawful for an employer to retaliate against an employee "because such employee has filed any complaint or instituted or cause to be instituted any proceeding under [the FLSA], or has testified or is about to testify in any such proceeding . . . .") (emphasis added). Section 215(a)(3) does not explicitly require that the employee's protected conduct relate to the assertion of his or her own statutory rights.

completely consistent with her duties as personnel director for the company to evaluate wage and hour issues and to assist the company in complying with its obligations under the FLSA. McKenzie therefore lacks an essential ingredient of a retaliation claim; that is, she did not take a position adverse to her employer or assert any rights under the FLSA. Accordingly, McKenzie did not engage in activity protected under § 215(a)(3), and we affirm the judgment as a matter of law in favor of the defendants on this alternative ground. Because this ruling disposes of McKenzie's FLSA retaliation claim, we need not address McKenzie's arguments regarding front pay, back pay, or emotional distress and punitive damages: As McKenzie's liability claim fails, so must her claims for legal and equitable relief.

B. Dismissal of McKenzie's State Law Wrongful Discharge Claim

McKenzie next argues that the district court erred in dismissing, for failure to state a claim, her state law tort claim for discharge in violation of Oklahoma public policy. We review de novo the district court's grant of a motion under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Roman v. Cessna Aircraft Co., 55 F.3d 542, 543 (10th Cir. 1995).

McKenzie's state law claim is predicated upon Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989). In Burk, the Oklahoma Supreme Court carved out a narrow exception to the Oklahoma employment-at-will doctrine by recognizing a tort cause of action "where an employee is discharged for refusing to act in violation of an established and well-defined public policy or for

performing an act consistent with a clear and compelling public policy." 770 P.2d at 29. McKenzie alleges that she was discharged for reporting her concerns that the company was not properly paying overtime pay to sales associates and department managers.

Assuming this allegation is true [12], McKenzie can prevail on her Burk claim only if she can show that Oklahoma has a clearly established public policy regarding maximum work hours and overtime pay.

McKenzie has not pointed us to any specific Oklahoma statute establishing a public policy of this sort. Moreover, we find no Oklahoma constitutional, statutory or decisional law which would require an employer such as Renberg's, Inc. to pay overtime compensation to its employees. The absence of any Oklahoma law on this subject is underscored by the fact that although the Oklahoma legislature has adopted the federal standards for minimum wages, see Okla. Stat. tit. 40 § 197.2 (making it unlawful for an employer in Oklahoma to "pay any employee a wage of less than the current federal minimum wage for all hours worked"), it has not adopted the FLSA standards governing maximum hours and overtime, see 29 U.S.C. § 207.

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[12] Because we are reviewing the sufficiency of the complaint, we must accept all well-pleaded allegations in the complaint as true and construe the allegations in the light most favorable to McKenzie. Doyle v. Oklahoma Bar Ass'n, 998 F.2d 1559, 1566 (10th Cir. 1993). Thus, we assume that McKenzie was retaliated against for reporting her good faith belief that Renberg's was violating the FLSA overtime provisions.

We also reject McKenzie's argument that the comprehensive Oklahoma statutory scheme governing the employer/employee relationship establishes a clear and compelling public policy mandating the payment of overtime compensation. Of the entire body of Oklahoma statutory law governing the employment relationship, McKenzie directs our attention to only one specific provision mentioning overtime pay, Okla. Stat. tit. 40 § 165.1. Section 165.1 is the definitions section of the Oklahoma Protection of Labor Act and defines the term "wages" as "compensation owed by an employer for labor or services rendered, including salaries, commissions, holiday and vacation pay, overtime pay, severance or dismissal pay, bonuses and other similar advantages agreed upon between the employer and the employee . . . ." Okla. Stat. tit. 40 § 165.1(4) (emphasis added). In light of the Burk court's admonition that the public policy exception be "tightly circumscribed" and reserved for violations of "established and well-defined public policy," 770 P.2d at 29, we believe section 165.1(4)'s passing reference to "overtime pay" is far too slender a reed upon which to base a public policy tort. Although it mentions overtime pay, section 165.1(4) does not prescribe a limit for maximum working hours, nor does it set forth a specific formula for calculating overtime pay .

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[13] Indeed, in those particular situations where the Oklahoma Legislature has mandated the payment of overtime to employees, it has provided the amount by statute. See, e.g., Okla. Stat. tit. 40 § 196.3(A) (requiring "all workmen employed by or on behalf of any public body engaged in the construction of public works" to be paid "not less than the prevailing hourly rate of wages for legal holiday and overtime work") (emphasis added). Section 196.2(3) of the statute defines the "prevailing hourly rate of wages" as "the wages and fringe benefits determined to be prevailing by the United

The absence of any clearly articulated overtime pay policy in the Oklahoma statutory scheme suggests that the Oklahoma courts would not entertain a Burk claim founded upon a discharge for reporting an employer's failure to pay overtime.

Despite the lack of a well-defined state policy, McKenzie argues that her Burk claim is cognizable because it is predicated upon a public policy found in a combined regime of both state and federal law. McKenzie relies on two cases of the Oklahoma Supreme Court to support this argument, Tate v. Browning-Ferris, Inc., 833 P.2d 1218 (Okla. 1992), and Todd v. Frank's Tong Serv., Inc., 784 P.2d 47 (Okla. 1989). In Tate, the court held that a Plaintiff who alleged a discriminatory discharge in violation of the Oklahoma and federal antidiscrimination statutes stated a claim under Burk. 833 P.2d at 1222-25. In Todd, the court upheld a Burk claim where the Plaintiff alleged that he had been discharged for refusing to operate a vehicle that did not comply with both state and federal safety regulations. 784 P.2d at 50.

We believe Tate and Todd are distinguishable from the case at bar. Unlike the present case, the alleged wrongful discharges in both Tate and Todd not only violated applicable federal law, but they also violated a mandate of state public policy clearly expressed in the Oklahoma statutes. In Tate, for instance, the Plaintiff alleged he had been fired because of his race--an action contrary to both the federal policy expressed in Title VII, 42 U.S.C. § 2000e et seq., and the state policy expressed in the Oklahoma antidiscrimination statute, Okla.

States Department of Labor pursuant to [federal law]."

Stat. tit. 25 § 1101 et seq. Similarly, in Todd, the Plaintiff alleged he was unlawfully discharged for refusing to operate an unsafe vehicle in violation of the federal Surface Transportation Assistance Act, 49 U.S.C. App. § 2305 (recodified at 49 U.S.C. § 31105(a)), and for refusing to operate a vehicle that was not in compliance with state safety regulations, Okla. Stat. tit. 47 §§ 12-201, 12-301. Here, by contrast, McKenzie cannot direct our attention to any specific Oklahoma policy or statute mandating the payment of overtime compensation to private employees. The most she can do is allege a violation of the federal FLSA. We therefore affirm the dismissal of McKenzie's Burk public policy claim .

CONCLUSION

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

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[14] Defendants alternatively argue that the FLSA preempts any state law tort claim based on an employer's retaliation against an employee for making an FLSA complaint. However, because McKenzie has not even asserted a violation of Oklahoma public policy cognizable under Burk, we need not reach the constitutional issue of preemption. See Ashwander v. TVA, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (noting well-established rule that federal courts should avoid deciding constitutional issues if narrower grounds for decision exist).

APPENDIX C - ORDER OF THE TENTH CIRCUIT COURT OF APPEALS DENYING REHEARING DATED OCTOBER 22, 1996

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-5197

LORI G. McKENZIE,
Plaintiff - Appellant,

v.

RENBERG'S, INC., and ROBERT L. RENBERG,
Defendants - Appellees.

ORDER
Entered October 22, 1996

Before SEYMOUR, Chief Judge, TACHA, and EBEL, Circuit Judges.

This matter comes one for consideration of appellant's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

The motion of Society for Human Resource Management to file an amicus brief in support of appellant's petition for rehearing is granted.

Entered for the Court

PATRICK FISHER, Clerk

By:/s/
Trish Carara
Deputy Clerk

APPENDIX D - 29 U.S.C. §203(a)

§ 203. Definitions

"As used in this chapter--

* * *

(a) 'Person' means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons."

APPENDIX E - U.S.C. §203(d)

§ 203. Definitions

"As used in this chapter---

* * *

(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization."

APPENDIX F - 29 U.S.C. §216(a)

§ 216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary to Labor; limitation of action; savings provision

"(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection."

APPENDIX G - 29 U.S.C. §216(b)

§ 216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision

"(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees similarly situated. No employee shall be a party Plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the Plaintiff, or Plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party Plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection."